COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-717-DG

BROWN-FORMAN CORPORATION AND
HEAVEN HILL DISTILLERIES, INC. APPELLANTS

Court of Appeals No. 2013-CA-2048-MR

v.

Appeal from Jefferson Circuit Court
Civil Action No. 2012-CA-3382
Division Nine, Hon. Judith McDonald-Burkman

BRUCE MERRICK, et al. APPELLEES

JOINT BRIEF FOR APPELLANTS

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Certificate of Service

The undersigned certifies that on October 12, 2015, copies of the Appellants' Brief were sent by U.S. Mail to Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; the Honorable Judith McDonald-Burkman, Judge, Division Nine, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202; and Counsel for Appellees: Douglas H. Morris, Lea A. Player, MORRIS & PLAYER PLLC, 1211 Herr Lane, Suite 205, Louisville, Kentucky 40222, and William F. McMurry, WILLIAM F. MCMURRY & ASSOCIATES, 624 West Main Street, Suite 600, Louisville, KY 40202.

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INTRODUCTION

This case presents an issue of first impression critically important to Kentucky's bourbon industry, which is highly regulated and controlled by an extensive permitting process under the federal Clean Air Act, and under a clear mandate by the Kentucky General Assembly that air emission standards in the Commonwealth shall not be more stringent than those required by federal law. The damages the plaintiffs seek allegedly flow from emissions specifically permitted by state and federal administrative authorities. The injunctive relief demanded by the plaintiffs would force the installation of untested and never-before-required emission control technology on bourbon aging warehouses in direct conflict with the Clean Air Act's administrative process for evaluating and determining the reasonable availability of such technology, and it would pose an impermissible obstacle to the achievement of the Clean Air Act's goals of providing clear standards to regulated industries and striking a balance between the desired ecological effect and the economic impact of those standards.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellants respectfully request oral argument. This appeal asks the Court to consider the extensive regulatory framework that governs the permitting process on which the bourbon industry depends to operate and to decide whether Plaintiffs' demand for relief, which disrupts that framework, can pass the obstacle of preemption. This is one of three separate actions pending against five different bourbon manufacturers in Kentucky, each demanding different state and federal trial courts to award relief that would require the installation of emission-capture technology on bourbon aging warehouses already in full compliance with federal and state law. To the contrary, EPA has ruled that no such reasonably available technology exists, after balancing all the criteria applied under the Clean Air Act, including the cost and effect of a standard on productivity and economic growth. *See* 42 U.S.C. § 7612(c). Oral argument provides an opportunity to discuss any questions about the regulatory scheme and how the relevant authorities can be reconciled and applied here to preempt actions that conflict with the goals of the Clean Air Act.

STATEMENT OF POINTS AND AUTHORITIES

OVERVIEW

Appellants Brown-Forman Corporation and Heaven Hill Distilleries, Inc. ("the Distillers") are Kentucky-based makers of bourbon who conduct their operations under very detailed permits issued under the combined auspices of the EPA and state authorities pursuant to the federal Clean Air Act ("the Act").

In sweeping amendments to the Act in 1990, Congress mandated that air pollution regulators balance ecological factors with economic considerations.

> *We have to strike a balance between stronger rules to protect our environment and the economic impact they will have on our industries and our life styles.*[1]

The Kentucky General Assembly compels the same balance in preserving clean air while "ensuring economic growth" through regulations "no more stringent than federal requirements." KRS 224.10-100(26). The Act's statutory framework thus commands cooperation among federal and state regulators in imposing a permitting process that instructs the industry on the air quality steps it must take, all the while balancing the goals of clean air and economic vitality. This carefully constructed process provides certainty and predictability to distillers so they can know how to manage air emissions before beginning the long, costly process of producing properly aged bourbon for consumers.

In furtherance of the goal of balancing ecology with economy, Congress established a regulatory process for determining the existence, or not, of "reasonably available emission control technology" (referred to in the

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[1] Evidence of Congressional intent, 136 Cong. Rec. H2511-02, 1990 WL 66714.

regulations as "RACT"). In three separate published reports, the EPA has concluded that there is no reasonably available emission control technology for capturing ethanol that escapes from aging bourbon barrels without adversely affecting the quality of the finished product. As a result, EPA has not required any bourbon manufacturers whose operations are otherwise regulated under EPA standards to install any particular type of emission control technology in their aging warehouses.

In this case, Plaintiffs allege that ethanol naturally escaping from aging bourbon barrels travels through the air to their property, where mold spores are already naturally present, and excites those spores to produce a black, sooty substance on the surface of the property. Even though it is undisputed that the Distillers are in compliance with all emission standards under their permits, Plaintiffs seek damages under theories of common law nuisance and trespass. More importantly, Plaintiffs ask the Court to require the Distillers to purchase, install, and operate a specific type of emission control equipment known as regenerative thermal oxidizers or RTOs. Plaintiffs make this demand despite EPA's repeated determination that there is no reasonably available control technology for capturing ethanol emissions from bourbon aging warehouses without substantially changing the quality of the product.

In addition to the two major bourbon manufacturers in Kentucky named as defendants in this case, the same plaintiffs' counsel has sued three other major bourbon manufacturers in two other actions in Kentucky (one in federal court in

Louisville and one in Franklin Circuit Court). Each of those suits asks a court or jury to require the use of RTO technology on bourbon aging warehouses in addition to seeking damages under common law claims of trespass and nuisance. The requested injunctive relief would force the installation of new technology in direct conflict with the process established under the Act for the evaluation of such technology, and it would pose an impermissible obstacle to achieving the Act's goals of providing clear standards to regulated industries and of striking a balance between the desired ecological effect and the economic impact of those standards.

The trial court here, after engaging in the appropriate claim-dependent conflict preemption analysis, held that the Act preempts Plaintiffs' demands for relief. Although the Distillers here have complied with the permitting process that the Act imposes, the Court of Appeals reversed. The Court of Appeals opinion not only obstructs the Act's purpose, it also creates the specter of different lawsuits against every bourbon manufacturer in Kentucky with each trial court in each separate action reaching idiosyncratic, even opposite, conclusions about equipment that should be used over and above what the law requires when administrators issue permits that give bourbon manufacturers the right to operate under the permit terms. Under Plaintiffs' theory, a trial court could grant a request for relief that threatens distillers' ability to produce bourbon at the quality level on which consumers rely today. This Court should reverse. Preemption bars Plaintiffs' Amended Complaint.

STATEMENT OF THE CASE

Economic Realities

Brown-Forman and Heaven Hill are well-known bourbon distillers that have produced excellent bourbon in Kentucky for decades. Brown-Forman has operated in the Louisville area for 145 years. Heaven Hill was founded in 1934. Because the Act, like KRS 224.10-100(26), "attempts to balance the environmental concerns with the economic realities of this country,"[2] the economic realities of the bourbon industry are highly relevant to applying preemption principles here in light of the need to preserve the proper balance that Congress plainly intended.

Bourbon is a distinctive product of the United States, and Kentucky is its birthplace. As of 2014, Kentucky distillers produce approximately 95% of all bourbon worldwide.[3] There are currently 37 companies with Kentucky distiller's

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[2] 136 Con. Rec. H129-01, 1990 WL 290318

[3] http://usi.louisville.edu/wp-content/uploads/2014/12/KDA-USI-Final-Report-2014.pdf, *The Economic and Financial Impacts of the Distilling Industry in Kentucky*, published by the Urban Studies Institute, University of Louisville in October 2014 ("Impact Study"). This Impact Study is the third state-wide study of the distillery industry since 2009. It provides a "comprehensive statement of the size and economic importance of the distillery industry in Kentucky and its impact on the state agricultural sector. It also estimates state and local tax revenue. The Kentucky Agricultural Development Fund contributes funding. This Court should take judicial notice of the Impact Study as a public record available from reliable sources on the internet. *Cf. Polley v. Allen*, 132 S.W.3d. 223 (Ky.App. 2004) (recognizing the propriety of judicial notice but denying its application because the party did not identify the uniform resource locator of the website where the information could be found). The Impact Study is a 65-page report and therefore not attached. But it is easily located.

licenses, 26 of which are long established, operating in 37 locations throughout 22 cities in 19 counties. (*Impact Study.* at 1, 7-8.) The most comprehensive source for industry employment data is the Quarterly Census of Employment and Wages, which estimates employment in the bourbon industry at 3,594 employees in 2013, with an average salary of $91,188. (*Id.* at 2, 9-12.)

Among 245 manufacturing industries operating in Kentucky, bourbon distillers stand second only to the animal processing industry in providing jobs and a higher employment multiplier. (*Id.)* Because bourbon production is linked to many other Kentucky industries, the distilling industry accounts for at least 15,400 jobs in the Commonwealth with an annual total payroll approximating $707 million (*Impact Study* at 3), not to mention the capital improvements that generate substantial property tax revenues and the tax revenue on the product itself. (*Id.* at 13-14,38-54.) Without the production of bourbon, the economic benefit that Kentucky receives from the bourbon industry would be significantly diminished.[4]

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[4] In addition to the industry of bourbon production, the Kentucky Bourbon Trail has become a top 10 destination in the country according to National Geographic and CNN International. (*Impact Study* at 54-60) Total tour attendance at Kentucky's bourbon distilleries has exceeded 2.5 million visitors over the past five years, according to the Ky Distillers Association (www.kybourbontrail.com/history), creating a significant economic boost for Kentucky's tourist industry.

Bourbon is a Federally Defined Product

Before a product can be labelled as "bourbon," it has to meet the definition set forth in federal regulations at 27 C.F.R. §5.22, which includes: (1) the mixture of grains (at least 51% corn without any additives) making up the "mash" from which the product is distilled, (2) distillation at 160 proof or less, and (3) aging in new charred-oak barrels for a period of at least two years. This is what makes bourbon different from other whiskey.

A key component of the bourbon manufacturing process is the aging process. After the distilled product is placed into the new charred oak barrels, the barrels are transported to warehouses where the product ages for a period of a minimum of two years, and up to twenty or more years. During the aging process, the liquid interacts with the charred oak barrels by expanding and contracting as the barrels are exposed to changing temperatures and ambient air flow. The movement in and out of the oak barrel over time gives bourbon its amber color and distinctive sweet flavor. When temperatures rise in summer, bourbon expands and seeps further into the charred oak barrel. When temperatures fall in winter, the liquid contracts and has less contact with the barrel.[5] Obviously any technological changes to the aging process would impact the expansion and contraction process within the barrels, and thus would impact

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[5] *See* Trade & Environment Database ("TED") Case Studies, Volume 14, Number 2, June 2004, No. 711, "Kentucky Bourbon and Protected Geographic Indication," published by American University, Washington, D.C. at http://www1.american.edu/ted/kentuckybourbon.htm.

the color and flavor of the product resulting in a product that no longer has the look or taste of bourbon.

It is the ethanol that escapes from the oak barrels during the aging process, often referred to as the "angels' share," that Plaintiffs are attacking. Plaintiffs' complaint focuses almost entirely on ethanol that "escapes from the wooden barrels used to age bourbon whiskey." (R. 152, Am. Compl. at ¶22-23.) By requiring Distillers to completely seal off aging warehouses, which would impact the temperature fluctuation and ambient air conditions that are so vital to the aging process that imparts bourbon's unique look and taste, Plaintiffs want to eliminate all ethanol emissions from the aging process. But under the Act, ethanol emissions are regulated by the EPA in partnership with state and local regulatory procedures. And, as the Court of Appeals recognized, Plaintiffs have never alleged "that the distilleries violated any federal or state laws or regulations." (Opinion at 3, App. A). They do not and cannot allege that the Distillers' facilities emit ethanol in violation of their detailed permits.

Preserving Air Quality

Federal Air Quality Functions. Congress passed the Clean Air Act in 1970 as monumental legislation demonstrating the federal government's commitment to improve air quality nationally. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (1976). The Act creates a comprehensive program for controlling air pollutants to protect public health and the environment. The EPA must establish national ambient air quality standards for each air emission that "cause[s] or contribute[s]

to air pollution which may be reasonably anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). "Public welfare" includes damage to and deterioration of property and personal comfort and well-being. 42 U.S.C. § 7602(h).

In 1990, Congress enacted a major overhaul to the Act to broaden its scope and establish comprehensive programs to govern emissions. The 1990 Amendments reflect Congress's legislative determination to strike the balance between improving air quality without overly disrupting industry:

> "The intent of this bill was to have a balance, a balance of America's air and America's jobs. The ecology and the economy." (136 Cong. Rec. H2915-01, 1990 WL 68355.)
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> "We have to strike a balance between stronger rules to protect our environment and the economic impact they will have on our industries and our lifestyles." (136 Cong. Rec. H2511-02, 1990 WL 66714.)
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> "The conference report before us strikes a necessary balance between economic and environmental concerns." (136 Cong. Rec. H12848-01, 1990 WL 165511.)
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> "Mr. Speaker, it was also important to the final agreement on this legislation that the economics of clean air be considered. We cannot ruin the economy of specific regions of the country or certain industries to meet over-zealous and unrealistic goals. This legislation attempts to balance the environmental concerns with the economic realities of this country, and I support its passage." (136 Cong. Rec. H12911-01, 1990 WL 290318.)

With the 1990 Amendments, Congress greatly expanded the Act's universe of regulation. Among other things, it added Title V, which for the first time established a comprehensive permitting program to govern each facility's air emissions in a systematic and pervasive manner. *Romoland Sch. Dist. v. Inland*

Empire Energy Ctr., LLC, 548 F.3d 738, 741 (9th Cir. 2008). Significantly, the EPA, in consultation with the Secretary of Commerce, the Secretary of Labor, and the Council for Clean Air Compliance Analysis, must conduct "a comprehensive analysis of the impact of this chapter on the public health, economy and environment of the United States." 42 U.S.C. § 7612(a). Congress specifically directed the EPA to "consider all of the economic, public health, and environmental benefits of efforts to comply with such standard." 42 U.S.C. § 7612 (b). And, the EPA" shall consider the effects of such standard on employment, productivity, cost of living, economic growth, and the overall economy of the United States." 47 U.S.C. § 7612(c).

Cooperative Federalism. The resulting standards are enforced through the Act's "cooperative federalism" and a "division of labor between individual States and the EPA" for reaching and maintaining national air quality goals. *See Sierra Club v. EPA*, 315 F.3d 1295, 1300 (11th Cir. 2002). Each state has "the primary responsibility for assuring air quality" from sources originating inside its borders, 42 U.S.C. at § 7407(a), by adopting a State Implementation Plan ("State Plan"). *Id.* at § 7401(a).

State's Air Quality Role. Among other things, State Plans must include enforceable emission limitations and other control measures, plans to monitor ambient air, requirements for permits before emission sources are constructed, and they must also demonstrate that the state will have adequate personnel, funding, and authority under state law to carry out the plan. 42 U.S.C.

§7410(a)(2). Each state must submit its State Plan to the EPA for approval. *Id.* at § 7410.

The EPA has approved Kentucky's State Plan, which includes the permitting program and emission limitations of the Louisville Metro Air Pollution Control District ("Metro District") as the "state" authority within Jefferson County.[6] The Kentucky Energy and Environment Cabinet enforces standards elsewhere in the Commonwealth. KRS 224.20-130. Once the EPA approves a State Plan, its requirements become federal law and are fully enforceable in federal court. 42 U.S.C. § 7604.

Kentucky May Not Exceed Federal Standards. Although the Act allows states to enact statutory or regulatory laws that are more stringent than the Act would otherwise require, 42 U.S.C. § 7416, it is significant that the Kentucky legislature has enacted statutes that forbid administrative agencies from establishing rules that are more stringent or burden industry more than federal law. *See* KRS 224.10-100(26) (the Energy and Environment Cabinet's power to "[p]reserve existing clean air resources while ensuring economic growth" is through regulations "no more stringent than federal requirements"); KRS 13A.120 (1)(a)(any Kentucky state "administrative regulations shall be no more stringent than the federal law or regulations").

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[6] Kentucky's State Plan can be found at 40 CFR Part 52, Subpart S, along with the status of EPA's approval of the State Plan. That portion which applies in Jefferson County may be found in 40 CFR §52.920 Table 2. Kentucky's State Plan is also available on the EPA website at http://www.epa.gov/region4/air/sips/ky/kytoc.htm.

Permits. Thus, the Distillers' air emissions are strictly controlled under Kentucky statutes and Metro District regulations, which cannot be more stringent than federal requirements. Their facilities must obtain operating permits from the Metro District that EPA approves. Brown-Forman holds a Title V Operating Permit under the Act, which requires that major sources obtain operating permits. *See* 42 U.S.C. §§ 7661 et seq., 40 CFR Part 70, Metro District Regulation 2.16. Heaven Hill holds a Federal Enforceable District Origin Operating Permit that includes self-imposed operational limits enforced by the EPA. *See* Metro District Regulation 2.17.

The permits impose limits on emissions (which in some cases mandate emission-reducing work practices) and delineate monitoring and reporting obligations, all designed to ensure that the Distillers' facilities comply with all applicable federal and state emission standards. Under Title V, these comprehensive permits list all of the Act requirements that apply to the source, 42 U.S.C. at § 7661a(a),(d), "provid[ing] regulated entities with a degree of finality and certainty once regulatory determinations have been made for a facility." *U.S. v. Murphy Oil USA, Inc.*, 143 F.Supp.2d 1054, 1101 (W. D. Wis. 2001). The extensive review process before a permit is ever issued includes an opportunity for public participation. 42 U.S.C. §7661a(b)(6); Metro District Regulations 2.07 and 2.17 § 8.

The permits under which the Distillers operate are lengthy and complex documents that detail the type of equipment to be used; the type, level, manner

and frequency of emissions; and specific monitoring, record-keeping, and reporting obligations to ensure compliance. *See* Metro District Regulation 2.17. To emphasize, Plaintiffs do not (and cannot) allege that either of the Distillers' facilities emit ethanol in violation of their duly issued permits. [7]

Proceedings Below

Plaintiffs/Appellees own real property in close proximity to the Distillers' bourbon aging warehouses. They complain about the presence of a fungus on their property, which they allege germinates in the presence of ethanol that is released during the bourbon aging process. The fungus allegedly causes a black film to cover surfaces that can be removed through power washing and bleaching. (7/30/13 Trial Court Order at 1, App. B.) The Distillers moved to dismiss the Complaint under CR 12.02(6) for failure to state a claim. While that motion was pending, Plaintiffs filed an Amended Complaint, which added two new plaintiffs. (R. 152 at ¶¶ 48-51.)

Most significantly for purposes of preemption, Plaintiffs' Amended Complaint sought injunctive relief to require the Distillers to install air emission

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[7] Plaintiffs' complaint refers to a Notice of Violation that the Metro District issued against Diageo North America, a distiller who is not even a party to this action, and speculate that the Distillers here are also violating the same Metro District regulation. [Am. Compl. at ¶¶ 84-85.] Any notice issued to Diageo is obviously irrelevant to this case. Brown-Forman and Heaven Hill have received no notices of violation, which shows they are not in Diageo's position. And a Notice of Violation is nothing more than a letter expressing a view of Metro District staff and does not represent any government agency determination. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980) (administrative complaint is not final agency decision and has no legal force). Finally, to the extent, if any, Diageo's Notice of Violation has any relevance here, it demonstrates that there is a method under the Act to regulate ethanol emissions.

control technology on aging warehouses to capture ethanol emissions that their air emission permits have never required. In fact, Metro District and the Kentucky Division of Air Quality do not include aging emissions when determining whether a distillery is a major emission source. The agencies classify ethanol from bourbon aging as "fugitive emissions" as that term is defined in 401 KAR 63.010 and Metro District Regulation 2.16. Key to that classification is the fact that, since at least 1978, the EPA has consistently acknowledged that conventional technologies used to capture and control air emissions (such as the regenerative thermal oxidizers demanded by Plaintiffs) should not be applied to bourbon aging operations based on concerns about the impact such technologies would have on the nature and quality of the product due to its unique aging process.[8]

Plaintiffs allege nevertheless that "reasonable and cost effective control technology exists" to capture the Distillers' ethanol emissions. (R. 153, Am. Compl. at ¶ 27.) They invoke a "duty to minimize and prevent" ethanol emissions (*id.* at ¶¶ 75, 97) and allege that each Defendant has failed "to properly construct, maintain and/or operate its facilities...." (*Id.* at ¶ 112.) Pointing to regenerative thermal oxidizer technology used in California on brandy aging

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[8] Cost and Engineering Study - Control of Volatile Organic Emissions from Whiskey Warehousing, EPA-450/2-78-013 (April 1978); Emission Factor Documentation, Distilled Spirits, Final report, EPA AP-42, Section 9.12.3 (March 1997); Approval and Promulgation of Air Quality Implementation Plans, 66 Fed. Reg. 56220 (Nov. 7, 2001). Pursuant to KRE 201, the Court may properly take judicial notice of government documents, including public documents and records available on the internet. *See Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004).

warehouses, Plaintiffs demand that a trial court decide whether to require bourbon manufacturers to seal off warehouses and install similar technology. (*Id.* at ¶¶ 118-46.) What Plaintiffs fail to recognize is that brandy is not bourbon and is not dependent on aging to define the product. Unlike bourbon, bandy is aged in previously used (rather than new), oak barrels at a constant and static cool temperature. Also, brandy is not aged for nearly as long as most bourbon ages.[9] These factors demonstrate that brandy is not as dependent on the liquid's interaction with the wood for its color and taste, and as a result, brandy is not as dependent on temperature fluctuation and ambient air flow during its aging process that are essential to the bourbon aging process.

Importantly, federal and state air emission regulations have never required that the bourbon industry seal its aging warehouses to capture ethanol emissions; doing so could make the production of bourbon, as we know it, impossible. The Distillers' warehouses currently contain thousands of barrels, most of which have been aging for years (some for more than a decade). The impact of previously unused technology could potentially be ruinous to the bourbon industry: the effects are unknown and the cost of experimentation too high, particularly when the Distillers have complied with every requirement of the Act. When regulators decide whether to require reasonably available control

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[9] Brandy is typically aged two years, but bourbon must be aged a minimum of two years and in most instances is aged for at least four years. In fact, federal law requires that if bourbon is aged less than four years, an age statement must appear on the label to inform consumers of that fact. 27 C.F.R. §540.

technology, they engage in a complex balancing process of what is technically and economically feasible. Before imposing the requirement of any additional control technology on the entire bourbon industry, the regulator would engage in extensive additional scientific study involving nuanced policy considerations. Plaintiffs' demand for relief requiring the imposition of such technology conflicts with this process.

The Distillers moved to dismiss the Amended Complaint based in part on preemption: The federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, preempts common law demands for technology far beyond the Distillers' permitting requirements and in conflict with the Act's goals: Judge McDonald-Burkman agreed, in part based on the Supreme Court's recent opinion holding that the Clean Air Act displaces federal common law claims. (App. B) She held: "Plaintiffs are not asserting that the Defendants are not in compliance with current regulations, but that the Court should require the Defendants conform to a different or higher standard of acceptable practices that have not undergone the proper administrative rulemaking process." [App. B at 3-4.] And her opinion cited to *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2539-40 (2011) ("*AEP*"), in which case the Supreme Court stated that an "expert agency is surely better equipped to do the job than individual . . . judges issuing ad hoc, case-by-case injunctions. . . . [J]udges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." The trial court therefore dismissed the Amended Complaint.

Plaintiffs filed a motion to reconsider, citing the recently issued decision in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3rd Cir. 2013), which found no preemption under circumstances substantially distinguishable from those at issue here. For example, *Bell* did not involve multiple actions against an entire industry in different counties throughout the state. The trial court denied the motion to reconsider, knowing that Plaintiffs had also filed an action in Franklin Circuit Court, where the court "determined that the Clean Air Act did not preempt state law nuisance claims." [App. C at 1.]

The trial court disagreed with the Franklin Circuit Court's decision and reliance on *Bell* and instead found the Fourth Circuit's reasoning more persuasive than the Third Circuit's in *Bell*. The Fourth Circuit held that the Act preempts state common law actions:

> A field of state law, here public nuisance law, would be preempted if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Here, of course, the role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the [State Plan] and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted.

North Carolina ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291, 303 (4th Cir. 2010) ("*TVA*") (citations and quotation marks omitted). The trial court here held: "Plaintiffs seek to have a judicial determination that Defendants' compliance

with federal and state regulations is unreasonable and require the implementation of new technology, thereby circumventing the administrative rulemaking process." (App. C at 2.)

The Court of Appeals reversed the trial court. (App. A) Its opinion does not reflect the legal considerations to be made in determining whether state law claims are preempted; and it does not reflect a thorough review of the terms of the Clean Air Act. Rather, the Court of Appeals chose to adopt the reasoning of *Bell*, rather than the Fourth Circuit's holding in *TVA* on which the trial court relied. Unlike *TVA*, *Bell* did not conduct the conflict preemption analysis that is necessary here, and it failed to properly apply *AEP*'s federal displacement analysis to state-law conflict preemption analysis by relying instead on a mistaken understanding of an order Supreme Court decision, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In adopting the reasoning of *Bell* rather than *TVA*, the Court of Appeals also failed to take into account that both *TVA* and this case concerned requests for injunctions to force the defendants to adopt certain emission control technologies, unlike the situation in *Bell*.

ARGUMENT[10]

Under the *de novo* standard of review applicable to statutory interpretation, *see Devasier v. James*, 278 S.W.3d 625, 631 (Ky. 2009), this Court

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[10] The issue here, preemption, was fully preserved below as it was the sole topic of the motion to dismiss granted by the Circuit Court and ruled on by the Court of Appeals. [App. A, App. B, App. C.]

should reverse. The Act creates a framework for cost-benefit analysis: "a comprehensive analysis of the impact" of regulatory requirements on "public health, economy, and environment." 42 U.S.C. §7612(a). The EPA considers "costs," namely the "effects of such standard on employment, productivity, cost of living, economic growth, and the overall economy…," and "benefits," specifically "all of the economic, public health and environmental benefits of efforts to comply with such standard." 42 U.S.C. §7612 (b) and (c). *See also* KRS 224.10-100(26). The federal and state authorities have engaged in their comprehensive review and issued permits to Distillers with detailed requirements, all part of the method by which Congress designed the Act to reach its goals: balancing ecology and economy and the certainty of requirements on which industry can depend. The Distillers here are entitled to rely on their permits as a testament that they are operating within the law.

While not mirroring the precise technical language of the Act (which speaks in terms of "reasonably available control technology"), Plaintiffs parrot the Act when they demand an injunction requiring the Distillers to install "ethanol-capture technology" that they claim is "available, affordable, and effective." (R. 152, Am. Compl. ¶¶ 131-39.) But the EPA itself has concluded that there is no "reasonably available control technology" available to the Distillers beyond what the permits already require. The evaluation of what constitutes reasonably available technology involves highly technical scientific fact finding that the Act leaves for experts and policy makers to decide. Plaintiffs would put

this issue in the hands of every courtroom in every county and in every one of the states. But as the Supreme Court observed in *AEP*, "individual district judges issuing ad hoc, case-by-case injunctions" (*id.* at 2539) would disrupt the overarching system that determines what a distiller must do to meet air quality standards. The equitable relief that Plaintiffs demand fundamentally destroys the balancing and predictability that the permitting process is designed to achieve. This Court should reverse the Court of Appeals and hold Plaintiffs' claims are preempted as a matter of law.

I. The Clean Air Act creates a sweeping and pervasive system of regulatory control over air emissions and thus preempts state common law that interferes with its objectives and methods.

A. Any state law that interferes with the methods by which federal law was designed to reach its goal is preempted.

The Supremacy Clause of the U.S. Constitution establishes that any state law, whether statutory or common law, that "interferes with or is contrary to federal law" is preempted by federal law. *Free v. Bland*, 369 U.S. 663, 666 (1962); U.S. Const. art. VI, cl. 2. Further, when Congress has delegated authority to an agency, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. And Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

The preemptive effect of federal law "necessarily includes all laws that are inconsistent with the 'full purposes and objectives of Congress.'" *Int'l Paper Company v. Ouellette*, 479 U.S. 481, 499 n.20 (1987) (emphasis in original). "When Congress intends federal law to 'occupy the field,' state law in that area is

preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal citations omitted). State law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494. Thus, all state law, whether statutory or common law, must fail when that law conflicts with a federal statute or regulation, or presents an obstacle to federal goals or methods.

Every preemption analysis must be "must be guided by the goals and policies of" the act at issue and must be rooted in the specific statute in question as it stands at the time of the analysis. *Ouellette*, 479 U.S. at 493. The preemption analysis may be resolved by the text of the federal statute, as in *Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct. 1968, 1971 (2011), in which case there is no need to examine legislative history as to purpose and methods. *Id.* at 1981. But where the statutory text is insufficient to reach a definitive conclusion, courts must examine the total context. *See, e.g., Arizona v. U.S.*, __ U.S. __, 132 S.Ct. 2492 (2012) (scrutinizing each of four state immigration law provisions in the context of current and historical federal law and regulation); *Wyeth v. Levine*, 555 U.S. 555, 566 (2009) (reviewing "the history of federal regulation of drugs and drug labeling" to identify the "purpose of Congress" with respect to USDA drug labeling requirements); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (examining history and policy considerations behind federal motor vehicle safety standard).

Preemption is always a matter of congressional intent, but when analyzing conflict or obstacle preemption, the preemptive force of federal law "does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. at 154. Indeed, a "narrow focus" on Congress's intent to supersede state law is "misdirected." *Id.*

B. The "sweeping" scope of the Clean Air Act has displaced federal common law.

The United States Supreme Court has described the scope of the regulatory authority created by the Act as "sweeping:" "On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007).

In *AEP*, 131 S.Ct. at 2540, the Supreme Court recently conducted a careful analysis of the statutory and regulatory scheme, history, purpose, and policy considerations of the Act when it ruled that the Act displaces federal common law claims. The trial court here properly applied *AEP*'s analysis, which provides a highly instructive account of the pervasive reach of the Act and the complex balancing of interests by EPA and state regulators using expertise and administrative processes to fulfill the Act's goals. *AEP* recognizes the enormous disparity between "the decision-making scheme Congress enacted," 131 S.Ct. at 2540, and a decision by a judge "confined by a record comprising the evidence the parties present" and "lack[ing] authority to render precedential decisions

binding on other judges."(*Id.*)

C. Application of conflict preemption principles in highly regulated areas like that here lead to a finding of preemption.

As this Court determines whether the Act preempts state common law in addition to displacing federal common law, the Court must be mindful of the correct conflict preemption analysis, under which preemption principles bar any claim that conflicts with a federal statute's goal as well as any claim that "interferes with the method by which the federal statute was designed to reach [its] goal." *TVA*, 615 F.3d at 303; *see also Geier*, 529 U.S. at 881 (preempting claims that serve "as an obstacle to the accomplishment and execution of the important means-related federal objectives."); *Ouellette*, 479 U.S. at 494 (state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal"); *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (state law may be preempted where, under the circumstances of a given case, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.")

In *Crosby, supra*, 530 U.S. at 373, the Supreme Court explained that in conflict preemption analysis, "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." The "entire scheme" of the Act must be considered, "and that which needs must be implied is or no less force than that which is expressed." *Id.* (citations omitted). In other words: "If the

purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* (citations omitted).

Circumstances like those here give rise to conflict preemption. "[R]egulatory situations in which an agency is required to find a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Farina v. Nokia, Inc.*, 625 F.3d 97, 123 (3rd Cir. 2010). "The balance ... can be skewed by allowing ... claims under state tort law." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). The Third Circuit explains:

> The reason why state law conflicts with federal law in these balancing situations is plain. When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a re-balancing of these considerations. A state-law standard that is more protective of one objective may result in a standard that is less protective of others.

Farina, 625 F.3d at 123.

In *Geier v. American Honda, supra*, 529 U.S. at 886, the Supreme Court found that federal law preempted common law tort claims alleging that an automobile was defectively designed because it lacked airbags. Although the technology was admittedly available, the Department of Transportation issued a regulation that authorized automobile manufacturers to choose from a range of passive restraint devices. In setting its standard, the DOT was required to

consider not only safety, but also costs, consumer preferences, and the encouragement of technological development. *Id.* at 875. The Supreme Court concluded that allowing alternative state standards to arise via the imposition of liability in a tort suit would interfere with the DOT's policy choice. *Id.* at 881. The common-law claims were preempted.

In *Buckman, supra,* 531 U.S. at 353, the Supreme Court preempted tort claims alleging fraudulent misrepresentations had been made to the FDA in connection with approval of orthopedic bone screws. The Court found that the FDA's mandate required it to balance the safety of medical devices with the need to bring approved products to market quickly, and, as part of the balance between its statutory objectives, the FDA used its authority to punish misrepresentations. *Id.* at 348-50. The Court concluded that allowing tort claims to alter that balance towards greater safety would "dramatically increase the burdens" on the industry by requiring compliance with varying state standards, and it would diminish the expedience of the approval process. *Id.* at 350-51.

A useful analogue to the "cooperative federalism" of the Act and the statutory and regulatory interplay at bar can be found in the banking context: federal laws and state laws regulate various banking activities, and "it is often said that we have a 'dual banking system' of federal and state regulation." *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 314 (2nd Cir. 2005). Despite the retention of a state's power to regulate banks within its jurisdiction, state law is preempted if it will "significantly interfere" with powers granted to national

banks under federal law. *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 33 (1996). Thus, in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, supra,* the U.S. Supreme Court stated that the principle of preemption "nullifies" state law when it actually conflicts with federal law - and that such conflict arises "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 458 U.S. at 153, *quoting Hines v. Davidowitz.* The Supreme Court explained that a conflict presented between California law and the federal regulation "did not evaporate because the [federal] Board's regulation simply permits, but does not compel" the use of certain clauses declared unenforceable in California, *Id.* at 155: while compliance with both the federal regulation and the California rule was not impossible, the California courts were "limiting the availability of an option the [federal regulatory] considers essential to the economic soundness of the thrift industry," and thus posing an obstacle to the federal objective. *Id.* at 156.

In the banking system, Congress delegated power to a federal agency. In regard to air emissions, Congress delegated power to the states to develop a State Plan that would become enforceable as federal law. The Act envisions that each state will establish a regulatory scheme that includes, among other things, a permitting system that will establish for each air emissions source one single permit that includes all of its obligations. Plaintiffs' common-law claims seeking damages and injunctive relief with respect to the Distillers' permitted activities

conflict with the Act's goals and also interfere with the methods Congress designed to reach its goals.

D. Plaintiffs' claims are preempted because they unavoidably conflict with core goals of the Act and the methods Congress chose to achieve those goals.

In performing the required conflict preemption analysis, the trial court properly looked at the goals of the Act and the methods chosen by Congress to achieve those goals and determined that the relief sought by Plaintiffs in this case conflicted with those goals and methods such that their claims were preempted. "[T]he role envisioned for the states has been made clear. Where Congress has chosen to grant states an extensive role in the Clean Air Act's regulatory regime through the [State Plan] and permitting process, field and conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously drafted." *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 303 (4th Cir. 2010).

As amended in 1990, two critical goals of the Act are striking the balance of competing interests (protecting both ecology and economy, as one House member put it), and establishing certainty over what is required with respect to air emissions from any source. To accomplish its goal of balancing cleaner air with a thriving economy, Congress "entrusts such complex balancing to EPA...." *AEP*, 131 S.Ct. at 2539.

Certainty for each regulated entity is another important goal of the Act: without certainty, economic activity could be severely curtailed with no corresponding environmental benefit. The federally enforceable permits issued by states to fulfill Title V requirements provide that certainty, enabling each facility owner to know exactly what must be done to comply with the law as it pertains to air emissions. State operating permits issued as part of a state's strategy embodied in its State Plan also provide that certainty. Allowing common-law nuisance, negligence, and trespass claims like those brought by Plaintiffs to override carefully crafted permits would ring the death knell for certainty. The Fourth Circuit recognized as much in *TVA*, stating, "If courts across the country were to use the vagaries of public nuisance doctrine to overturn the carefully enacted rules governing airborne emissions, it would be increasingly difficult for anyone to determine what standards govern." 615 F.3d at 298.

If facilities were subject to common-law challenge for engaging in activities that are wholly in accord with their lawful permits, claims like those in the Amended Complaint would undo all the careful work of Congress in enacting Title V and allowing states to rely on non-major source permits as a State Plan tool. Business owners would never have the certainty of knowing their facilities are operating legally when they are in compliance with promulgated environmental regulations and in conformity with approved permits that regulators have deemed reasonable. Instead, facilities' emissions would always

be subject to the whim of individuals, who need not engage in balancing a facility's economic benefits and its worth to society at large against their own personal economic incentive. "Without a single system of permitting, '[i]t would be virtually impossible to predict the standard' for lawful emissions, and '[a]ny permit issued ... would be rendered meaningless." *TVA*, 615 F.3d at 306, quoting *Ouellette*, 479 U.S. at 497.

In addition to conflicting with the Act's goals, Plaintiffs' claims interfere with the Act's methods to reach those balanced goals. "[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate [air] pollution. A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Ouellette*, 479 U.S. at 494.

E. The Act offers multiple ways for citizens to protect their interests.

The Act provides multiple avenues for enforcement, including administrative and civil proceedings by the EPA or by state agencies (operating under the power delegated by the Act), criminal enforcement, and civil suits by private citizens. *See AEP*, 131 S.Ct. at 2537-38. If the EPA has not acted, states and private parties may petition the agency for a rulemaking, per 42 U.S.C. § 7607 (h). *Id.* The Act offers myriad other ways for citizens to participate and protect their interests. They have the opportunity to comment during a facility's permit process, under 42 U.S.C. § 7661d. They can seek judicial review of a long list of EPA actions, including the promulgation of standards or the approval of State Plans. *Id.* at § 7607(b). If a facility is not abiding by its federally enforceable

permit and the regulators are taking no action, concerned citizens can file an enforcement action. The 1990 Amendments gave federal courts new authority to impose civil penalties in citizen suits under the Act, *see* 42 U.S.C. § 7604(a), and allowed courts to order that such penalties "be used in beneficial mitigation projects" to "enhance the public health or the environment." *Id.* at § 7604(g)(2).

In light of the "multiple avenues" available for enforcement of the Act, the Supreme Court in *AEP* concluded that Congress had left no room for private citizens to bring tort actions under federal common law. *AEP*, 131 S.Ct. at 2537-38. In the words of the Supreme Court: "[I]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of [] emissions." *AEP*, 131 S.Ct. at 2539. "The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present." *Id.* at 2539-40.

The concerns raised by the Supreme Court in *AEP* are equally relevant to any assessment of conflicts with the Act created by state common law. The Amended Complaint centers on the premise that the Distillers have failed to

adopt technology that is reasonably available to control their ethanol emissions. The phrase "reasonably available control technology" (RACT) invoked by the Amended Complaint is a term of art in the Act - one that by its very terms suggests the application of EPA's discretion. *Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1252 (D.C. Cir. 2009). RACT determinations involve the kind of highly technical scientific fact finding that is best left to the expert agency. Rather than leave these and other complex scientific questions to the scientific experts and the policy makers who have been charged with balancing the competing interests of industry and individuals, Plaintiffs would put them in the hands of the courts in every one of the fifty states, and argue them to juries in every courtroom in every one of the 37 counties around Kentucky in which bourbon is distilled - potentially multiple juries in each county, as in Jefferson County where two lawsuits are pending against three distillers (in separate actions in state and federal court). There is simply no way to reconcile this contention with the comprehensive regulatory scheme of the Act, or the Supreme Court's rejection of similar proposals in *AEP*.

II. The Act does not extend state authority to exceed federal law outside the regulatory context, and even if it did, Kentucky law would not allow it.

The Supreme Court's precedents on obstacle preemption were applied in *Farina, supra*, 625 F.3d at 125, to preempt tort claims seeking to establish liability at common law against cell phone companies for allegedly suppressing information about the dangers of radio frequency emissions and seeking to

compel cell phone companies to provide headsets to all purchasers. The Third Circuit held: "A jury determination that cell phones in compliance with the FCC's SAR guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives" of safety and efficiency. *Id.* The Third Circuit particularly noted that treating the FCC's standards as a "floor on which state law can build" would inhibit nationwide cellular service.

In the Act, however, Congress explicitly allowed states to build above the floor – in the regulatory context. The Act does not explicitly allow states to use common law tort claims to exceed the floor set by federal law. *AEP* sets out all the policy reasons that allowing state law tort claims would stand as an obstacle to the achievement of Congressional goals, and interfere with Congressional methods. But if there were any case to be made that Congress left some room for the states to permit private citizens to bring tort claims that directly address activity permitted under the Act, even when demanding through injunctive relief changes to business operations that regulators have not seen fit to require, that argument fails when applied to the choices Kentucky has made to implement the Act.

A. The Act's explicit retention of state authority extends only to regulatory action.

42 U.S.C. § 7416, referred to as the "retention of state authority" clause, allows a "[s]tate or political subdivision thereof to adopt or enforce" more

stringent regulations. By its plain language, the retention of state authority savings clause does not authorize private common law or statutory causes of action, but only the imposition of more stringent standards by state or subdivision regulators. *See* 42 U .S.C. § 7602(d) (defining state); *United States v. Amawi*, 552 F.Supp.2d 679, 680 (N. D. Ohio 2008) (holding the judiciary is not a state or political subdivision); *Haudrich v. Howmedica, Inc.*, 642 N.E.2d 206, 209–10 (Ill. App. Ct. 1994) (same).

Notably, the retention of state authority savings clause of the Act does not match its analogue provision in the Clean Water Act. In the CWA, Congress provided that nothing in the chapter shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States." 33 U.S.C. § 1370. Congress did not include similar language in the Clean Air Act. Accordingly, the only explicit statement by Congress in the Act with regard to a state's ability to exceed federal law requirements is in the context of its State Plan and the work of its regulators in issuing permits – activity wholly in accord with the goals and methods of Congress.

B. Kentucky law offers nothing for the savings clause to "save."

Courts in other jurisdictions have concluded that common law tort claims are not preempted by the Act by relying primarily on 42 U.S.C. § 7604(e), referred to as the savings clause. 42 U.S.C. § 7604 generally empowers citizens to file federal lawsuits to enforce a standard or limitation set by the Act. Subsection (e), titled "Non-restriction of other rights," states in pertinent part: "Nothing in

this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

Section 7604(e) is on its face limited to savings from the effects of "this section," that is, the citizen action provisions of § 7604. The Supreme Court held in *Ouellette* that the analogous provision in the CWA's savings clause "does not purport to preclude pre-emption of state law by other provisions of the Act." 479 U.S. at 493. And the U. S. Supreme Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Geier*, 529 U.S. at 870. Indeed, the *Geier* Court noted with great skepticism that Congress is unlikely to have crafted a savings provision in order to tolerate a conflict otherwise forbidden by preemption principles, since such an interpretation "permits that law to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Id.* at 872 (citation omitted).

Plaintiffs asserted below that § 7604(e) shows that Congress preserved their common-law rights, generally. But Section 7604(e) does not purport to create or enumerate any rights in addition to the citizen suit rights set out in the

remainder of § 7604;[11] moreover, a person or class of persons must have some right under another source of law to seek "any other relief." Kentucky law offers no such right. Rather, Kentucky has explicitly declared that it chooses not to exercise its authority over air emissions more stringently than the federal government allows. *See* KRS 224.10-100(26). And while the Kentucky State Plan includes KRS 77.175, whereby a person can seek injunctive relief for violations of air emissions permits (although the Distillers are not in violation of their permits), the State Plan does not have any provision that authorizes private persons to seek injunctive relief (or damages) for permitted air emissions. In general, Kentucky jurisprudence has established that where a statute, "specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute," and may not pursue common law actions to the same end. *See Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985).

Like the plaintiffs in *AEP*, Plaintiffs can file a citizen suit authorized by § 7604, or they can file a complaint under KRS 77.175 if they believe the Distillers have failed to comply with existing Act requirements. Or Plaintiffs can petition both the EPA and the Commonwealth to enact new limits on ethanol emissions (recognizing that Kentucky, by statute, cannot adopt more stringent limits than required by the EPA). "The Act itself thus provides a means to seek ... the same

[11] Notably, it also makes no distinction between rights that persons may have at federal or at state common law – and the Supreme Court in *AEP* concluded that this provision did not save federal common law claims.

relief the plaintiffs seek.... We see no room for a parallel track." *AEP*, 131 S.Ct. at 2538. These Plaintiffs cannot pursue the remedies they seek on a "parallel track" of tort claims.

The federal-state balance established in the Act allows states to exceed the federal minimums in the state regulatory context. Even if the savings clause can be read to allow for the preservation of tort claims as an alternate method of enforcing the Act, Kentucky's State Plan makes no reference to private parties bringing lawsuits to challenge activity governed by permits. What Kentucky has done, via explicit statutory enactments, is refuse to allow its regulators to exceed the federal floor set by the Act. Thus, it makes no sense that the Act's savings clause could be used to allow Kentucky judges or juries to exceed that floor through a savings clause intended to protect the federal-state balance of power.

C. The Court of Appeals should not have blindly followed *Bell*.

The Court of Appeals relied upon the Third Circuit's decision in *Bell, supra*, 734 F.3d 188, to determine that the Plaintiffs' common-law tort claims were not preempted. The Court of Appeals concluded that it should follow *Bell* rather than affirming the trial court's decision, which rested on *AEP* and a Fourth Circuit decision, *TVA, supra*, because "the language given in *Bell* is clear, unambiguous, and subject to but one interpretation," while *TVA* was more complex, and because *Bell* was the more recent decision. [App. A at 6-7.] The Court of Appeals made no analysis of the claims pursued by the Plaintiffs in this matter to determine whether those claims are better analogized to those in *Bell* or

in *TVA*, or how Kentucky law affects the analysis.

With all respect to the Court of Appeals and the jurists of the Third Circuit, the *Bell* decision is deeply flawed and a poor guide for examining the claims at issue here. The defendants in *Bell* had argued that the common law remedies sought in the lawsuit would conflict with, and thereby be an obstacle to, the regulatory scheme effected by Congress - that is, conflict preemption - but the *Bell* panel never engaged in a conflict preemption analysis. Instead, *Bell* found that the Act did not preempt state law claims based on the U.S. Supreme Court's 1987 holding in *International Paper Co. v. Ouellette, supra.* 734 F.3d at 194.

Ouellette involved the Clean Water Act, not the Clean Air Act, but the *Bell* court glossed over the distinctions by calling them "similarly comprehensive environmental statute[s]." *Id. Bell* then examined the savings clauses in the Act - without recognizing that in *Ouellette*, the Supreme Court construed Clean Water Act savings clause language that does not appear in the Clean Air Act. Although the "common language" of the Act savings clause is present in its entirety in the CWA, the CWA savings clause has an additional provision not present in the Clean Air Act, specifically preserving state authority "with respect to the waters (including boundary waters) of such Stat[e]" - and it was on this distinct language that the *Ouellette* Court focused. *Ouellette*, 479 U.S. at 493, citing 33 U.S.C. § 1370.

Rather than examining the full Act as the Supreme Court had in *AEP*, the opinion in *Bell* reduced *AEP* to a footnote, 734 F.3d at 197, fn 7, and concluded

that it should reach the same result as had *Ouellette*. In addition to its failure to consider differences between the Clean Air Act of today and the Clean Water Act of 1987, and its failure to acknowledge the distinct language of the Clean Water Act savings clause, *Bell* thoroughly misunderstood the analysis in *Ouellette*. In *Ouellette,* the Supreme Court did not simply recite the savings clause language as the answer, but performed a thorough and comprehensive preemption analysis of whether the claims asserted in the case before it conflicted with the goals and methods of the CWA. As detailed above, such preemption analysis must be firmly rooted in the Act as it exists today – not in the CWA as it existed thirty years ago. The Third Circuit discarded *Ouellette*'s detailed conflict analysis as mere "[p]ublic [p]olicy [c]onsiderations" without any effort to determine whether the goals or methods of the CWA might differ from those put to work in the Act, or how the *Ouellette* decision in 1987 might have affected the balance between competing interests tackled by Congress when making substantial revisions to the Act in 1990.

Bell grossly oversimplified *Ouellette* to the mere holding that tort claims arising from the law of the state in which the alleged polluter was located were not preempted. *See* 734 F.3d at 194-95. But *Ouellette* set forth three basic reasons that the Supreme Court found the Clean Water Act did not preempt the source state common-law claims in question. (1) Allowing those claims to proceed did not disturb the federal-state balance, because the states were empowered to adopt stricter standards than the federal government required. (2) Despite the

common-law claims, the source would not be subject to an indeterminate number of potential regulators, as it could still look to a single authority in the source state. And (3), states could be expected to take their own nuisance laws into account when setting permit requirements.

Whether or not those three considerations were properly applicable to the claims before the Third Circuit in *Bell*, it is unquestionable that they cannot hold true to govern the claims in this case. (1) Kentucky law does not allow air emission standards to be any stricter than the federal government has required – and if the state cannot impose more stringent limits in its own capacity, it makes no sense that the Act would allow judges or juries to do so. (2) Every court in Kentucky – and indeed, multiple juries within one jurisdiction – could reach a different conclusion, resulting in an indeterminate number of conclusions as to what is required of a distiller, undermining the *Ouellette* assumption that a source can look to a single authority for guidance. And (3) while the permit-issuing agency may consider nuisance law in setting relevant permit limits, in Kentucky compliance with a permit is not a legal defense to a nuisance claim such that, absent preemption, a source would remain subject to a potentially indeterminate number of jury verdicts or court orders.

Ouellette is not inconsistent with finding state common law nuisance claims preempted by the Clean Air Act on the grounds of conflict preemption. *TVA, supra*, 615 F.3d at 298, better addressed the application of federal conflict preemption law, including *Ouellette,* to state nuisance claims under the Act.

There, the State of North Carolina brought state law nuisance claims seeking the installation of additional control technology on four TVA electric generating plants. On appeal from the district court's judgment requiring the installation of control technology beyond that required under the Act, the Fourth Circuit reversed, relying in part on *Ouellette* and explaining that, notwithstanding the Act's savings clause, the application of state tort law to emissions regulated under the Act would "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air," and would result in "a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id.* at 296.

The *TVA* opinion premised its recognition of Clean Air Act preemption of state nuisance claims upon two fundamental conflicts between the Act and state nuisance law. First, the Fourth Circuit explained that the vague nature of state nuisance law is incompatible with the detailed and comprehensive nature of the joint federal-state regulatory structure implemented by Congress through the Act. *Id.* at 301. This very comprehensiveness provides the Act with "inclusiveness and predictability." *Id.* By contrast, although state public nuisance law can encompass environmental matters, *TVA* explained that "it does so at such a level of generality as to provide almost no standard of application" and thus lacks any "manageable criteria." *Id.* at 302.

Second, the application of state nuisance law to regulated emissions would also conflict with the Act by "reorder[ing] the respective functions of courts and agencies" established by Congress under the Act. *Id.* at 304. In enacting the Act in its current iteration, Congress determined that the establishment of emission standards "required a very high degree of specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields that agencies rather than courts were likely to possess." *Id.* at 305. In opting for establishment of emission standards through agency action instead of litigation, Congress also provided for receiving inputs from the "varied practical perspectives of industry and environmental groups." *Id.* Finally, *TVA* noted that regulation, unlike litigation, "provide[s] an opportunity for predictable standards that are scientifically grounded and thus give rise to broad reliance interests." *Id.* at 306.

Based on these two conflicts, the Fourth Circuit concluded that there are

> a host of reasons why Congress preferred that emission standards be set through agencies in the first instance rather than through courts. The prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments, would most assuredly keep matters unsettled.***
>
> It is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of source states and permit holders in favor of the nebulous rules of public nuisance.

Id. (emphasis added). These same considerations regarding the importance of relying on experts in administrative agencies, rather than judges and juries with far less scientific information or expertise at their disposal, were critical to the Supreme Court's determination three years later in *AEP* that the Act displaced claims under federal common law.

D. Unlike other cases where preemption was not found, the injunctive relief demanded here clearly conflicts with the Act.

In this action, the Circuit Court honed in on the issue of injunctive relief sought by the Amended Complaint, stating: "In the present action, Plaintiffs are not asserting the Defendants are not in compliance with current regulations, but that the Court should require the Defendants conform to a different or higher standard of acceptable practices that have not undergone the proper administrative rulemaking process." [Appx. B at 4.] The Circuit Court rightly concluded that using tort law to force the Distillers to alter their air emissions in ways not required of them by the appropriate administrative rule-making bodies would frustrate the purposes and objectives of Congress, undermining the carefully crafted statutory and regulatory scheme Congress has put in place to govern and permit such emissions.

In its reliance on *Bell*, the Court of Appeals made no effort to consider the issue of injunctive relief, and the differences between the claims at bar and the claims in *Bell*. The Third Circuit particularly noted the fact that the plaintiffs made concessions at oral argument about the extent of the injunctive relief they

sought, limiting themselves to an order compelling the defendant to clean properties rather than an order requiring the installation of control technology. 734 F.3d at 193. The Iowa Supreme Court in *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014), made a similar distinction as to the case before it, which involved a single grain facility out of compliance with its permits. The *Freeman* Court observed that if the plaintiffs should prevail on the merits, "any remedy involving damages or remediation would simply not pose the kind of conflict with the permitting process that the sweeping injunction in *TVA* presented," and found the "question of whether injunctive relief would conflict with the CAA" was not yet ripe based on those facts. *Id.* at 85.

The Fourth Circuit in *TVA* reversed an order granting injunctive relief to the State of North Carolina in a public nuisance action challenging the pollution from power plants located in Alabama and Tennessee, and the scope of that injunction was vital to its holding. 615 F.3d at 296. The Fourth Circuit found that the litigation amounted to a collateral attack on the process chosen by Congress to establish appropriate standards and grant permits for the operation of power plants, and an "injunction-driven demand" for changes was inferior to a system-based analysis of what might be suitable. *Id.* at 309. Observing that the equipment modification ordered by the district court was estimated to cost in excess of one billion dollars, *id.* at 298, the Fourth Circuit held that the injunction requiring extensive changes to equipment based on a public nuisance theory

conflicted with the Act where the existing equipment had been approved under the Act's regulatory framework. *See id.* at 302–03.[12]

In *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), the plaintiffs recovered injunctive relief and damages for air pollution under Kentucky nuisance law. It appears that the *Bell* court significantly misunderstood *Ellis,* in which preemption was never discussed,[13] but a closer examination of *Ellis* is instructive on the issue of what injunctive relief should look like for private plaintiffs in connection with claims arising from air emissions. The *Ellis* plaintiffs began their lawsuits by filing citizen suits; only those claims on which plaintiffs gave proper notice to the EPA and state regulators were allowed to proceed. 390 F.3d at 468. The EPA promptly filed enforcement actions in federal court, and the Kentucky Division of Air Quality administratively addressed the defendants' permit requirements. *Id.* The EPA eventually proposed a consent decree to resolve the enforcement action, *id.*; the district court ruled the consent decree barred all private "claims regarding all past violations and all continuing violations up to the date the court entered the decree," *id.* at 469, and on appeal the plaintiffs conceded that their fugitive dust claims pre-dating the filing of the

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[12] The Fourth Circuit further found "it would be difficult to uphold the injunctions because TVA's electricity-generating operations are expressly permitted by the states in which they are located." *Id.* at 309.

[13] Although preemption was not raised, the *Ellis* court applied the doctrine of *Burford* abstention to dismiss plaintiffs' claims that the defendants' permits were inadequate or should have been handled differently. 390 F.3d at 478-480. The district court "deferr[ed] to the Kentucky Division of Air Quality and its administrative review process" as to certain claims, and rejected other claims as an impermissible "collateral challenge to the agency's permitting decisions." *Id.* at 479.

consent decree were barred. *Id.* at 473. In other words, the acts of the administrative regulators trumped any private tort recovery for events occurring before the consent decree.

Rather than standing for the proposition that "states are free to impose higher standards on their own sources of pollution" via tort common law, as the *Bell* court stated, 734 F.3d at 198, in *Ellis* the Sixth Circuit reversed the district judge's award of injunctive relief to the extent that plaintiffs sought relief "on 'more stringent terms than those worked out by the EPA.'" 390 F.3d at 477, *quoting EPA v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1404 (8th Cir. 1990). The Sixth Circuit said:

> Such second-guessing of the EPA's assessment of an appropriate remedy -a mere three months after the entry of the decrees - fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where the EPA has "failed" to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view. *See Gwaltney, 484 U.S.* [*of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 108 S.Ct. 376 (1987)]at 61, 108 S.Ct. 376 (citizens cannot "seek the civil penalties that the [EPA] chose to forgo"); *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356-57 (8th Cir.1998) (private plaintiffs cannot "collaterally attack" a state environmental agency's decision that a certain level of civil penalties suffice for the same violations alleged in the citizen suit); *Orange Env't, Inc. v. County of Orange*, 923 F.Supp. 529, 540 (S.D.N.Y.1996) (citizens cannot "overrule the judgment of the EPA and demand an additional and different type of remediation than that settled upon by the federal authorities").

390 F.3d at 477 (emphasis added).

The state law damages and injunctive relief awarded to the *Ellis* plaintiffs arose solely from their post-consent decree claims that the defendants had

violated their Act permits. The *Ellis* court held that under the Act the plaintiffs had no right to enforce the consent decree – but once the consent decree was entered, further "fugitive dust violations constituted a common-law nuisance under state law." *Id.* at 469. Plaintiffs in the case at bar have not alleged that the Distillers are causing a nuisance by violating their permits. Rather, Plaintiffs wish to prove that the Distillers are causing a nuisance by engaging in activities permitted under federal law, and to enjoin them from continuing those duly permitted activities.

The scope of the injunctive relief sought in this case is aligned with that at issue in *TVA*, and distinct from that in *Bell*. While Plaintiffs' claims are couched in common law terms, Plaintiffs have asked this Court to deem ethanol emissions from the Distillers' facilities "excessive" and have requested injunctive relief to require the installation of control technologies that will halt ethanol emissions from those facilities. [Am. Compl. at ¶ 144.] Reaching an equitable resolution of this case that is both technically and economically feasible would require not only extensive additional scientific study, but also nuanced policy determinations regarding whether or not to impose control technology requirements that have never been required of the industry as a whole on two major producers of bourbon.

With certain distillers – who manufacture numerous and varied brands of bourbon – subject to court orders to make use of technology that might seriously affect product quality, the market for bourbon could experience massive

disruption and flight by consumers who would no longer be certain of what they were getting in each bottle they purchased. Every court in Kentucky could reach a different conclusion as to whether or what technology would be required. This chaos would only be increased for large enterprises like the Distillers, which have multiple aging facilities in different counties. The resulting anarchy of standards for any distiller's aging operations would conflict with the Act's goal of certainty, stand as an obstacle to its method of permitting, and disrupt Kentucky's clearly stated policy that the Commonwealth will not regulate air emissions more stringently than the federal government.

E. Similarly, Plaintiffs' damage claims conflict with the Act.

Although Plaintiffs' claim for injunctive relief is the claim most clearly preempted by the Act, their negligence, nuisance, and trespass claims for damages are preempted for much the same reason – the proper limits on ethanol emissions and the question of whether there is reasonably available control technology are, under the Act, determinations to be made by the appropriate federal and state agencies rather than individual juries.

The negligence claim concerns whether the Distillers had a "duty to minimize and prevent the accumulation of whiskey fungus on Plaintiffs' property" and to prevent "ethanol emissions from entering on to Plaintiffs' property." [R.152, Am. Compl. at ¶¶ 74, 75.] As the Amended Complaint recognizes, that duty hinges on whether the Distillers have violated air quality regulations under the Act:

> Defendants herein release ethanol into the atmosphere in amounts similar o[r] greater than Diageo [a distiller that is not a party to this action] and therefore such conduct in Franklin County [presumably, Jefferson County was intended] is a violation of the air quality regulations imposed by the Commonwealth of Kentucky.
>
> To the extent that Diageo breached its duty to the Plaintiffs when they violated section 1.09 of the [Metro District's] regulations, Defendants here have breached their duty to the Plaintiffs.

[*Id.* ¶¶ 84-85.] Similarly, Plaintiffs' trespass claim depends upon their assertion that the Distillers' "failure to properly construct, maintain, and/or operate [their] facilities" resulted in an "invasion of Plaintiffs' possessory interests." These are, however, determinations that the Act places squarely with the state and federal air regulators.

Plaintiffs' temporary nuisance claim hinges on their assertion that the Distiller's "ethanol emissions are a temporary nuisance" that "can be corrected or abated at reasonable expense to the" Distillers. [*Id.* at ¶¶ 91-92.] But, as set forth above, the EPA has repeatedly acknowledged that conventional technologies used to capture and control emissions should not be applied to whiskey-aging operations based on concerns about their effects on the product. When regulators decide whether to require reasonably available control technology, they engage in a complex balancing process of what is technically and economically feasible. The EPA has consistently decided that no additional technology is reasonably available for the bourbon industry, and careful scientific study and balancing of

interests would precede any policy change by the regulator. The reasonable availability of additional control technology and whether it should be required, are matters that the Act has placed in the hands of state and federal regulators, not jurors across the country.

CONCLUSION

The Act's savings clause language preserving a state's right to more stringently regulate in-state emissions cannot be construed to encompass a private common-law right of action. Doing so would place state court judges and juries, not federal, state, or local administrators and rule-makers, in ultimate control of emissions standards – a result that would clearly contravene the principles and policy objectives of the Act.

The Court of Appeals followed *Bell* and blindly embraced the outcome of *Ouellette* without looking at its animating principle – namely, the preemption of any state law that conflicts with the goals or methods of a federal law and regulations. 734 F.3d at 197-98. This Court should not make the same mistake. If it is not possible to declare that Congress has preempted source-state law in all cases involving emissions regulation, nevertheless it has preempted claims like those at bar, which amount to a collateral attack on the permitting method established by Congress under the Act.

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